

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

FILED BY CLERK

MAR 19 2008

COURT OF APPEALS
DIVISION TWO

THE STATE OF ARIZONA,

Appellee,

v.

ARMANDO JIMENEZ,

Appellant.

2 CA-CR 2007-0195

DEPARTMENT B

MEMORANDUM DECISION

Not for Publication

Rule 111, Rules of
the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PINAL COUNTY

Cause No. CR-200200301

Honorable Boyd T. Johnson, Judge

AFFIRMED

Terry Goddard, Arizona Attorney General
By Randall M. Howe and David A. Sullivan

Tucson
Attorneys for Appellee

Harriette P. Levitt

Tucson
Attorney for Appellant

E C K E R S T R O M, Presiding Judge.

¶1 After a jury trial, appellant Armando Jimenez was convicted of aggravated assault, criminal trespass, misconduct involving weapons, and burglary. He was sentenced to enhanced, presumptive prison terms on all the charges, including a ten-year, consecutive term for the weapons charge and concurrent terms for the other three offenses, the longest of which was twenty-eight years. On appeal, Jimenez argues “the trial court improperly admitted evidence concerning [his] arrest.”¹ We affirm Jimenez’s convictions and sentences for the reasons set forth below.

Facts and Procedural Background

¶2 “We view the facts in the light most favorable to sustaining the convictions.” *State v. Robles*, 213 Ariz. 268, ¶ 2, 141 P.3d 748, 750 (App. 2006). Accompanied by a woman and her daughter, Jimenez stopped by the house of his sister, Irma, who was not home at the time. However, Irma’s boyfriend, Ricky, allowed them inside. The two women then stayed in the living room watching television while Jimenez and Ricky went into the kitchen. There, Jimenez drew a “Tec-9” handgun, pointed it at Ricky’s head, ordered him to his knees, and demanded an apology for something Ricky had allegedly done years before to a family member. Jimenez threatened to kill Ricky if he refused to apologize.

¶3 Irma then returned home with her daughter, Nicole, along with Jimenez’s mother. When Nicole opened the kitchen door she saw Ricky on his knees, looking scared,

¹Jimenez initially challenged the legality of his sentence, but he filed a notice of errata withdrawing his arguments on that issue.

and Jimenez standing nearby. Nicole quickly alerted Irma that something was wrong. Once Irma saw that Jimenez had a gun, she told him to leave her house.²

¶4 Seeking to arrest him for the events at Irma’s house, the police found Jimenez the next day as he walked away from the restaurant where he worked. During the course of that arrest, Jimenez drew a gun and one of the officers shot him. Before trial, Jimenez filed a motion in limine to preclude the state from introducing details surrounding his arrest, except those that established that when he was arrested he possessed a “Tec-9,” the same weapon allegedly used to threaten Ricky. The state opposed the motion on several grounds. Although the trial court held a hearing on this and other motions filed by Jimenez, he has not provided us a transcript of the hearing. In its minute entry, the court entered general findings of fact relating to Jimenez’s arrest in the context of the motion in limine, but there is nothing in this or any other minute entry setting forth the court’s ruling on the motion.

¶5 On the first day of Jimenez’s trial, however, the court suggested in comments to counsel that it had granted Jimenez’s motion, at least in part:

THE COURT: Then we have the issue of the arrest, we dealt with that last week, so there is a ruling, right or wrong. You’ll have a chance to tell your officers where we stand with that?

[PROSECUTOR]: Yes, Your Honor, and I want to clarify that what they are not to mention is that Mr. Jimenez was shot as a part of the arrest.

²Jimenez had taken the gun to Irma’s house several days before, and she had explicitly forbidden him to bring it there again.

THE COURT: Unless that's raised in cross-examination by [defense counsel] and then you can get into the details.

[PROSECUTOR]: But they can testify that he did draw the weapon, that they had to arrest him?

THE COURT: They made an arrest and here's the weapon and it matches the description, I guess, that the victims gave the night before. Okay?

[PROSECUTOR]: Okay.

THE COURT: General description.

[PROSECUTOR]: General description.

¶6 Notwithstanding this colloquy, police detectives testified in detail about Jimenez's arrest. Not only did they testify that the gun recovered from Jimenez during his arrest matched the description of the gun used to threaten Ricky, they also stated that Jimenez took cover when they approached him, disobeyed police commands, looked furtively around, ran away, drew his gun, and pointed it at the police. Defense counsel did not cross-examine either of the detectives who arrested Jimenez but, during a side-bar conference, he requested that the record reflect his "continuing objection to all of this testimony based upon [the] prior motion in limine."³ The court acknowledged the objection and, in seeming contradiction to its earlier remarks suggesting that such testimony was to be limited, made "a continuing ruling that it comes in."

³The state apparently overlooked Jimenez's continuing objection, claiming in its answering brief that "Appellant did not object" to the testimony of the two police officers involved in his arrest.

Discussion

¶7 Jimenez asserts “[t]he state . . . went far beyond the trial court’s ruling” by eliciting testimony that he had fled from police and had pointed a weapon at them in the course of his arrest. He thus contends the trial court erred by admitting this prejudicial evidence over his objection. “We review evidentiary rulings for abuse of discretion.” *State v. Garza*, 216 Ariz. 56, ¶ 37, 163 P.3d 1006, 1016 (2007). We will not disturb a conviction, however, if an incorrect evidentiary ruling constitutes harmless error. *State v. Beasley*, 205 Ariz. 334, ¶ 27, 70 P.3d 463, 469 (App. 2003). An error is harmless if a reviewing court can determine, “beyond a reasonable doubt, that the error did not contribute to or affect the verdict.” *State v. Bible*, 175 Ariz. 549, 588, 858 P.2d 1152, 1191 (1993). A court may find error harmless when there is overwhelming, properly admitted evidence of the defendant’s guilt. *See, e.g., State v. Davolt*, 207 Ariz. 191, ¶ 64, 84 P.3d 456, 474 (2004).

¶8 Assuming arguendo that the trial court erred in admitting testimony about Jimenez’s arrest, any such error was harmless. Both Ricky and Irma, Jimenez’s sister, provided an abundance of evidence establishing Jimenez had committed the charged offenses. Nicole, Jimenez’s niece, corroborated Ricky’s claim that Jimenez had assaulted him. Jimenez did not challenge Nicole’s credibility. The gun Jimenez had pointed at Ricky was distinct and readily identifiable, and Jimenez did not dispute the fact that he possessed the same gun the following day when he was arrested. Given the overwhelming evidence of

Jimenez's guilt, we conclude that even if the trial court erred in admitting the challenged evidence, the error did not affect the jury's verdicts. *See Bible*, 175 Ariz. at 588, 858 P.2d at 1191.

¶9 Jimenez counters that the jury would not have otherwise believed Ricky's and Irma's testimony because both of them had prior felony convictions. He maintains Nicole was the only other person who had firsthand knowledge of the incident, and she testified she had not actually seen a gun, even though she was in a position to see it. And, he emphasizes that the police did not interview everyone who had been at the house when the assault allegedly took place.

¶10 None of these factors alters our conclusion that any erroneous admission of the arrest evidence did not affect the outcome of the trial. *See Davolt*, 207 Ariz. 191, ¶ 43, 84 P.3d at 470 (harmless error where "verdicts would not have been different" absent improper evidence). It was the exclusive task of the jury to assess Ricky's and Irma's credibility in the context of their felony convictions, and it had the opportunity to do so. *See State v. Clemons*, 110 Ariz. 555, 556-57, 521 P.2d 987, 988-89 (1974). Moreover, Jimenez never suggested that either Ricky or Irma had any motive to fabricate such serious criminal charges against him. And, as noted, Nicole's unchallenged testimony, though circumstantial, further corroborated their descriptions of the events. In light of such testimony, we cannot say that the specific circumstances of Jimenez's arrest, beyond the

similarity of the gun, even if improperly admitted and even if potentially prejudicial to him, would have meaningfully affected the jury's assessment of Ricky's and Irma's testimony.

¶11 The convictions and sentences imposed are affirmed.

PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

PHILIP G. ESPINOSA, Judge

JOSEPH W. HOWARD, Judge